

(23)

No. 90-97

Supreme Court, U.S.
R I N E R
DEC 4 1990
JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF UNION OF AMERICAN PHYSICIANS
AND DENTISTS, AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

LAWRENCE ROSENZWEIG
2001 Wilshire Boulevard
Suite 600
Santa Monica, California 90408
*Attorney for Union of
American Physicians and
Dentists, Amicus Curiae*

WILSON - BIRD PRINTING CO., INC. - 789-0086 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

| | Page |
|--|------|
| INTEREST OF THE AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. A SEPARATE BARGAINING UNIT FOR PHYSICIANS IS DICTATED BY PRIOR NLRB PRECEDENT AND THE WORKING CONDITIONS OF PHYSICIANS | 3 |
| II. A PHYSICIANS BARGAINING UNIT AVOIDS POSSIBLE PROLIFERATION BASED UPON SPECIALTY OR LOCATION.. | 4 |
| CONCLUSION | 4 |

TABLE OF AUTHORITIES

| CASES: | Page |
|---|---------|
| <i>FHP, Inc.</i> , 274 NLRB 1141 (1985) | 2, 3 |
| <i>International Brotherhood of Electrical Workers Local 474 v. National Labor Relations Board (St. Francis Hospital)</i> , 814 F.2d 697 (D.C. Cir. 1987) | 2, 4 |
| <i>Mary Thompson Hospital, Inc.</i> , 621 F.2d 858 (7th Cir. 1980) | 4 |
| <i>Mon Valley United Health Services</i> , 238 NLRB 916 (1978) | 3 |
| <i>Montefiore Hospital</i> , 261 NLRB 569 (1982) | 2, 3, 4 |
| <i>NLRB v. Res-Care, Inc.</i> , 705 F.2d 1461 (7th Cir. 1983) | 4 |
| <i>NLRB v. West Suburban Hospital</i> , 570 F.2d 213 (7th Cir. 1978) | 4 |
| <i>New York University Medical Center, a Division of New York University</i> , 217 NLRB 522 (1975) | 2, 4 |
| <i>Ohio Valley Hospital</i> , 230 NLRB 604 (1977) | 2, 3 |
| RULES AND REGULATIONS | |
| <i>Notice of Proposed Rulemaking I</i> , 52 Fed. Reg. 25142 (1987) | 3 |
| Rules of the Supreme Court of the United States, Rule 37.2 | 1 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

 No. 90-97

AMERICAN HOSPITAL ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

 On Writ of Certiorari to the United States
 Court of Appeals for the Seventh Circuit

BRIEF OF UNION OF AMERICAN PHYSICIANS
 AND DENTISTS, AS AMICUS CURIAE
 IN SUPPORT OF RESPONDENTS

This Brief Amicus Curiae is submitted in support of the position of the Respondents. Written consents from all parties have been obtained as required by Rule 37.2 of the Rules of this Court.¹

INTEREST OF THE AMICUS CURIAE

This Amicus Curiae brief is submitted by the Union of American Physicians and Dentists, (UAPD), in order to present the perspective of physicians who have been

¹ The written consents have been filed with the Clerk of the Court.

involved in the collective bargaining process. As an organization representing physicians and dentists in 11 states, the UAPD has litigated collective bargaining unit issues with respect to physicians before the NLRB, as well as other agencies. See, e.g., *FHP, Inc.* 274 NLRB 1141 (1985).

In its attempts to communicate and represent the interests of physicians, the UAPD testified at the NLRB rulemaking hearings and also filed an amicus brief while the instant case was pending below in the Seventh Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The creation of a separate physicians unit through the rulemaking process is the most efficient method of reaching an inevitable result. Prior to rulemaking, the NLRB created separate physician bargaining units in such cases as *Montefiore Hospital*, 261 NLRB 569 (1982) and *Ohio Valley Hospital Association*, 230 NLRB 604 (1977).

None of the judicial challenges to the NLRB's interpretation of the Health Care Amendments has involved challenges to the creation of physician bargaining units. The debate between the Courts and the NLRB with respect to appropriate bargaining units in the health care industry has revolved around other employees, such as maintenance personnel. *International Brotherhood of Electrical Workers Local 474 v. National Labor Relations Board (St. Francis Hospital)*, 814 F.2d 697 (D.C. Cir. 1987).

In fact, prior NLRB precedent indicates that the creation of a separate physicians bargaining unit eliminates the possibility of proliferation of bargaining units caused by distinctions between physicians. *Montefiore Hospital, supra*; *New York University Medical Center, a Division of New York University*, 217 NLRB 522 (1975).

The NLRB's exercise of its rulemaking authority eliminates wasteful hearings which, based upon prior board

precedent and working conditions of physicians, would inevitably find that physicians are entitled to their own bargaining unit.

ARGUMENT

I. A SEPARATE BARGAINING UNIT FOR PHYSICIANS IS DICTATED BY PRIOR NLRB PRECEDENT AND THE WORKING CONDITIONS OF PHYSICIANS.

The separate physicians unit created by the NLRB's rulemaking process is completely consistent with prior NLRB precedent. The NLRB has proposed a separate physicians unit "because of physicians' separate education, training, and skills, and particularly because of their unique position as the ultimate supervisors of patient care. . . ." *Notice of Proposed Rulemaking I*, 52 Fed. Reg. 25142, 25147 (1987). This reasoning is virtually identical to the NLRB's decision in *Ohio Valley Hospital Association*, 230 NLRB 604 (1977), in which the NLRB excluded physicians from a bargaining unit of hospital professionals. In *Mon Valley United Health Services*, 238 NLRB 916, 924 (1978), the NLRB indicates, at Footnote 17, that physicians possess a separate and distinct community of interest from other professionals. In *Montefiore Hospital*, 261 NLRB 569 (1982), the NLRB established a unit of physicians and dentists providing health services for correctional institutions.

The creation of physicians bargaining units has not been a matter of controversy in the courts. Typically, challenges to the creation of a physicians unit are based on considerations other than fears of proliferation. For the most part, the issue of whether physicians are managerial or supervisory, rather than employees under the Act, has been the focus of attention. *FHP, Inc., supra*; *Montefiore Hospital, supra*.

The differences between the Courts and the NLRB regarding health care bargaining units have involved other

hospital employees, such as maintenance personnel or nurses. *International Brotherhood of Electrical Workers Local 474 v. NLRB*, *supra*; *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980); *NLRB v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978).

II. A PHYSICIANS BARGAINING UNIT AVOIDS POSSIBLE PROLIFERATION BASED UPON SPECIALTY OR LOCATION.

NLRB precedent prior to the issuance of the health care rules illustrates that an overall physicians unit avoids proliferation caused by physicians specialties or location. For example, in *New York University Medical Center, a Division of New York University*, *supra*, the NLRB rejected a proposed unit of 60 psychiatrists who were members of the School of Medicine's Department of Psychiatry. The NLRB found that the psychiatrists had a broader community of interest with other physicians.

In *Montefiore Hospital*, *supra*, the NLRB created a unit of physicians and dentists from various locations of the employer, rather than granting bargaining unit status to each separate location.

These cases illustrate the accuracy of the observation made by the court below that the term "proliferation" has always referred to finer divisions of the health-care work force than attempted in the rule issued by the NLRB. (See, Pp. 13a-14a of Appendix to Petition for Writ of Certiorari.

CONCLUSION

No one in the health care industry seriously contends that physicians should not have a separate bargaining unit. The creation of a separate bargaining unit through rulemaking eliminates the necessity of time-consuming and wasteful hearings when representation petitions are filed. The NLRB's decision to issue a rule on this question is clearly the most efficient manner to

deal with the issue. Accordingly, the UAPD urges affirmation of the Seventh Circuit decision.

Respectfully submitted,

LAWRENCE ROSENZWEIG
2001 Wilshire Boulevard
Suite 600
Santa Monica, California 90403
*Attorney for Union of
American Physicians and
Dentists, Amicus Curiae*